

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

JERRY LEON DEES, JR.,

Plaintiff,

Vs.

HYUNDAI MOTOR MANUFACTURING
ALABAMA, LLC, and HYUNDAI
MOTOR AMERICA, INC.,

Defendants.

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**CASE NO.
2:07-cv-00306-MHT-CSC**

**RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO QUASH NON-PARTY
SUBPOENA TO INDUSTRIAL CARE MANAGEMENT**

COMES NOW the Plaintiff, Jerry Leon Dees, Jr., ("Dees") and files this Response in Opposition to Defendants' Motion to Quash Non-Party Subpoena to Industrial Care Management. In support thereof, Dees states as follows:

1. Dees hereby incorporates his previous arguments regarding standing and waiver of the privilege in his Response in Opposition to Defendants' Motion to Quash Non-Party Subpoena to Alabama Psychiatric Services and Saeed A. Shah, M.D. (Doc. 74).

2. The subpoena to Industrial Care Management ("ICM") should be upheld because the privilege does not apply to ICM.

ARGUMENT

I. The Subpoena to ICM Should Be Upheld Because the Privilege Has Been Waived

Dees hereby incorporates his previous arguments regarding waiver of the privilege in his Response in Opposition to Defendants' Motion to Quash Non-Party Subpoena to Alabama Psychiatric Services and Saeed A. Shah, M.D. (Doc. 74).

Additionally, the subpoena to ICM should issue because the privilege does not apply to ICM. “For the privilege to attach, the communication must be both confidential and made in the course of diagnosis or treatment.” *Doe v. Ensey*, 20 F.R.D. 422, 425 (M.D. Pa. 2004). Further, “the privilege does not apply to records maintained by [a third party] in monitoring [a patient’s] rehabilitation.” *Ex parte Etherton*, 773 So.2d 431, 434 (Ala. 2000). In *Etherton*, a patient sued her dentist alleging various claims. The patient attempted to subpoena the custodians of records at facilities where Dr. Etherton had sought treatment for chemical dependency. Dr. Etherton moved to quash the subpoenas, alleging the psychotherapist/patient privilege. The Alabama Supreme Court, in addressing the trial court’s denial of Dr. Etherton’s motions to quash, found that Dr. Etherton had not waived his privilege regarding confidential communications between himself and his treating psychological professionals. *Id.* at 436. The court further found that the records in the possession of Dr. Guin, who did not treat Dr. Etherton but only monitored his rehabilitation, were not protected by the privilege. *Id.* at 434.

Here, ICM, as the contractor running the HMMA medical clinic, received medical records and/or reports from the providers of Mr. Brookshire’s chemical dependency treatment in order to monitor Mr. Brookshire’s rehabilitation. (Doc. 74-2, numbered ¶ 3.) As in *Doe*, any records of Brookshire’s treatment maintained by ICM are not protected by the psychotherapist privilege.

WHEREFORE, the PREMISES CONSIDERED, Defendants’ Motion to Quash Non-Party Subpoena to Alabama Psychiatric Services and Saeed A. Shah, M.D. should be denied.

s/ Vincent F. Kilborn, III
 Vincent F. Kilborn, III (KILBV4484)

s/ David A. McDonald

David A. McDonald (MCDOD5329)

s/ W. Perry Hall
W. Perry Hall (HALLW9043)

s/ Jeffrey R. Sport
Jeffrey R. Sport (SPORJ5390)

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CERTIFICATE OF SERVICE

I do hereby certify that I have on the 20th day of December, 2007, electronically filed the foregoing pleading with the Clerk of Court using the CM/ECF system which will send notification of such filing to:

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